

Mitigating Brexit through Bilateral Free-Movement of Persons

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Rather than bemoaning the Brexit choice the UK made, it is time to start thinking about living with it in a way that would cause as little disruption as possible for all those concerned. How to mitigate, at least to some degree, the sudden, unprecedented loss of rights that Brexit caused? EU citizenship not any more on the table, bilateral freedom of movement of persons agreements with the EU Member States, EEA countries and Switzerland could offer a way forward. This solution is fully in line with EU law and has already been tested.

A. When crucial rights evaporate, the value of UK citizenship shrinks

At midnight Brussels time, one hour before the start of 2021 in London, free movement of persons between the UK and the EU ended. The [UK-EU Trade and Cooperation Agreement](#) has nothing to say on this subject: all the work, settlement and non-discrimination on the basis of nationality, as well as political rights enjoyed as a matter of EU law by the citizens of the UK in 26 EU Member States (all but Ireland), 2 EEA countries (since Liechtenstein has never granted this right) and Switzerland have ended instantly. The other side of the coin, although less overwhelming in terms of scale, is equally important: EU citizens (with the sole exceptions of the Irish), Norwegians, Icelanders, Liechtensteiners and the Swiss are not any more welcome to live in the UK as of right. Everyone has lost. This is particularly true in socio-cultural terms: part of de-europenisation of Britain. When it comes to citizens' rights Brexit came down to sleep-walking into a new reality, where UK law is now in direct opposition to the very rationale of EU law: non-discrimination on the basis of nationality, a principled belief that a particular legal status of attachment to a European state should not matter for the enjoyment of key rights and cannot be used as a pretext for discrimination came to be replaced with a proclamation that only the 'British' (and their former colonial subordinates, the Irish) should have rights on the UK soil and that they are *by law* better than any Dutchman, Italian or Pole. The EU, [quite obviously](#), reciprocated, dismissing [the idea put forward by Verhofstadt](#) of granting 'associate EU citizenship' to UK nationals to safeguard their rights after Brexit.

This is a crushing blow to UK citizenship, shrinking the horizon of opportunities of the British citizens for the first time in the history of that state to the territory of the British Isles. In the absence of the Empire to compensate for the loss, the [Quality of UK](#) nationality [fell from a global top-10](#) to a solid second-rate position, comparable in terms of rights and opportunities to the citizenships of Argentina and Brazil. Since 11 pm on 31 December 2020 British [blue passport is junk](#). With visa-

free travel to the Schengen zone (which is not an unconditional right, resulting in dozens of Brits turned back at EU borders [already](#) in the first Brexit hours) the UK citizenship is akin to the US, Ukrainian, Argentinian or Timorese. Once we look at any rights beyond 90 days in half a year stay, the UK offers a citizenship no different from Indian, Moroccan or Russian, as far as rights in the EU are concerned. The overnight change from EU citizenship rights to the current situation is quite steep. It is indispensable to attempt to mitigate this fall.

B. When crucial rights are gradually restored: mitigating the big loss

Mitigating the core effect of Brexit for ordinary people could be a tricky business. First of all: to reinstate free movement of persons proper between the UK and the EU is no longer an option. Not only is this not in the agreement, but it cannot be achieved without the renegotiation of the whole UK-EU relationship. Secondly, even the most casual observer of Brexit would be aware of the role that xenophobia and nationalism played in this unfortunate affair, with EU citizens being blamed by then-Prime Minister May [‘to jump the queue’](#), while they thought they were simply residing at home in the Union. It is thus fairly trivial that the UK government would not be interested in reinstating free movement in its present form, even if the current reality amounts to locking its own citizens in UK territory.

Yet, two important factors could help mitigate this. Firstly, EU law has virtually nothing to say about access to work and residence rights in the territory of EU Member States by third-country nationals who are not family members of EU citizens and who do not fall within the scope of strictly delimited groups, whose residence is regulated by EU law, like the Blue Card holders, for instance. This means that in contrast with Schengen visa-free travel arrangements, which are within the sphere of EU competences (with some exceptions), once we speak about the most significant rights enjoyed by the third country nationals, including settlement and work rights, these remain firmly within the national realm of regulation, unless an EU-level agreement is concluded, like the EEA. This is superb news for UK citizens, since it means that any EU Member State (or EEA country, or Switzerland) can decide to open up its territory for UK nationals willing to settle and work there and stop discriminating them with no breach of EU law or the UK-EU Agreement. Such a state's right is enshrined in International law, and UK citizens already benefit from such rights in the Republic of Georgia, in one example, by a unilateral decision of the latter – as well as on the Svalbard archipelago in northern Norway via a multilateral treaty framework.

Given the current political realities of post-Brexit Europe and that the Empire is no more, such rights will obviously never be given unilaterally: a reciprocal arrangement will be necessary.

This leaves plenty of room for optimism for free movement of persons between the UK and some EU Member States: what was politically viewed as impossible at the supranational level of the EU as a whole – could be achieved bilaterally. Importantly,

given the lack of EU's competence to preempt such arrangements, the desire to 'punish' Britain threatening to undermine EU's own credibility at times – as with the [illegal sacking of AG Sharpston](#) from the CJEU no matter what – would play no role here, allowing a more cold-hearted approach to prevail in the interest of all.

Indeed, the free-movement between Ireland and the UK post-Brexit already provides a great illustration of such a bilateral approach. This could be just the beginning. Agreements with the Netherlands, Denmark, Norway, Switzerland, and a handful of other countries could be concluded fairly quickly. By mitigating the Brexit effects at the most crucial, human level, they will be in the mutual interest of all nations involved.

C. The Scope of Bilateral Free-Movement of Persons Agreements

What should these agreements cover? The UK was part of EU's full free movement regime until a couple of days ago. Not much will need to change in bringing about a bilateral replication of the rights lost. These will have to include freedom to enter as of right, freedom to settle and to work as well as not to be discriminated against on the basis of nationality – what the Irish citizens enjoy in the UK post-Brexit. State-parties – be they EU Member States, EEA states, or Switzerland on the one hand and the UK on the other – could also include applicable conditions into the package. One can forget about the limitations of EU law while building such bilateral relationships, opening the doors to a lot of flexibility. Such flexibility should be used on the common understanding that, after decades of successful free movement, providing for at least some free movement rights is better than treating each others' citizens as Indians, Russians or Moroccans, which is in no-one's interest.

In the best possible case scenario, the bilateral free movement of persons agreements could replicate EU law in force, or, better, improve on it, by offering more robust political rights, for instance. This means that work-seekers' rights, family members' rights and political rights could all be thrown in. The agreements being bilateral in nature entails that not all the EU Member States will get the same rights for their citizens in the UK and, conversely, that the UK would not get the same rights for its own citizens across EU Member States. *Realpolitik* could work well here: Spain (just like Ireland already), with the strong British diaspora, could have the full package in the agreement, including political rights, which will be obviously mutually beneficial; the Netherlands or Denmark with strong exchange of highly-educated professionals and students could ensure non-discrimination for those attending schools and the job-seekers on top of self-sufficient employed professionals. Crucially, treating different cases differently should be the fundamental starting point, not the other way round, creating a solid ground for quick progress in the negotiations.

This is where departing from the one-size-fits-all approach of supranational law could be in the perceived interest of the UK. Truth is that not all the citizens of EU Member States benefitted from free movement in the same way. While a 'balanced'

relationship existed between some countries and the UK, free movement was but a one-way street for others. Bilateral agreements would allow doing justice to these objective differences without proclaiming them away as EU law demanded. This is the second – admittedly the most tricky – consideration to take into account: if Brexit is at least in part a product of xenophobia and nationalism, bilateralism will allow the latter to flourish. Some push back might come from the EU Council itself, with some of the neglected countries complaining about their citizens being left out of the free movement arrangements, should they fail to secure favourable bilateral deals. Indeed, if our intuition is right, no bilateral agreement on free movement of persons will be forthcoming with Poland, Hungary, or Croatia. This being said, having at least the countries at the same (or higher) level of economic development as the UK involved in the new bilateral free-movement regime would already be a huge step forward compared with the current impasse. ‘If the Croatians do not get it the Swiss and the Danes should not either’ is not a helpful starting point in the current circumstances. Moreover, EU law as it stands would not back such an approach. Indeed, the EU will not be in the position to enforce ‘non-discrimination’ between EU citizens, since the whole point of Brexit is to abolish non-discrimination of the basis of nationality in the UK and given that the issue of [settlement and work rights in the Member States, just as that of nationality](#), is still a fundamental purview of the Member States. This state of affairs is testified by the countless ways in which Member State nationalities can be acquired and the absence of harmonization in the area of (permanent) residence for third country nationals. Indeed, [as one of us has argued with Lindeboom](#), pluralism is the essential starting point of EU law in nationality and residence domain. The Ireland-UK free-movement of persons framework post-Brexit illustrates this simple point well. Visa-free travel offered to EU citizens – an EU law issue – is a different matter: should the UK introduce visas for 90 day stays of some of the EU citizens, retaliation will come quickly, as the EU [only allows the US](#) to treat EU citizen travelers differently at the border.

There is thus a lot to be said in favour of free movement of persons bilateralism, which would move the relationship between the UK and continental Europe one step up from the low point of Brexit. Such approach will be in strong mutual interest of the states concerned. Plentiful successful national-level free-movement frameworks with third countries have been in operation in the EU Member States for a long time, from Monaco-France to the Andorra arrangements. Ireland-UK is not – and must not be presented as – an outlier. The growing complexity of the map of citizenship rights in Europe brought about in bilateral settings should not deter us from thinking pro-actively about getting out of the current impasse with the focus on the settlement, non-discrimination and work rights of the ordinary Europeans in mind.

